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TIONG HUNG MING

v.

KALIMANTAN HARDWOOD SDN BHD; WEELUK HOLDING SDN BHD (APPLICANT)

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HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[COMPANIES (WINDING UP) NO: 20-28-2-1997]
18 JUNE 2008

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COMPANY LAW: *Winding up - Stay of proceedings - Application for - Whether a stay under s. 243 Companies Act 1965 could be given as of right - Whether stay of winding up order should be sparingly exercised if no appeal pending - Whether there were cogent reasons for granting stay*

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The applicant, through a notice of motion, sought leave and an order to stay winding up proceedings under s. 243 of Companies Act 1965 (CA) when there was no appeal pending in the court of appeal and the winding up order was given as early as 23 June 1997. The application was based on the following grounds: (i) the respondent had fully satisfied the debts owing to the petitioner; (ii) there were no other debts owing by the respondent to other creditors; (iii) there was nothing for the liquidator to investigate with regard to the conduct of the respondent, its directors and/or its officer. The issues that arose were (a) whether a stay under s. 243 could be given as of right and (b) whether a stay could be given when there was no pending appeal or cogent reasons for granting the stay.

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Held (dismissing notice of motion encl. 40):

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(1) As a general rule, the court has jurisdiction to set aside, vary or rescind any of its order, inclusive of a winding up order for good and explicit reasons taking into consideration public interest, notwithstanding s. 243 of CA 1965 does not encompass such wide powers. (para 7)

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(2) Stay of winding up order should be sparingly exercised if there was no appeal pending; and in almost all cases the stay would not be granted if there was substantial delay in making the application. The reasons for the delay must be satisfactorily explained. (para 7)

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(3) The affidavit in support must set out valid reasons for the application. It was not sufficient to assert that the debt had been repaid and/or the creditors had no objection. Further, the affidavit in support of the Director of Insolvency must be seen to be a report after thorough investigation of the affairs of the company, and the reason for the application for stay on the facts and on the grounds stated by the applicant. The issue of public interest must also be taken into account. (para 7)

(4) There was substantial delay in making the application. The reasons for the delay were not explained. The affidavit in support and that of the affidavit of Director of Insolvency did not give satisfactory grounds for the court to exercise its powers under s. 243 of CA 1965 and/or inherent jurisdiction of the court. (para 7)

Case(s) referred to:

A & BC Chewing Gum [1975] 1 WLR 579 ***(refd)***

Brindon New Zealand Ltd v. Tent World Ltd [1992] 3 NZLR 725 ***(refd)***

Blatt Ray Inc [1939] 20 CBR 447 ***(refd)***

BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd [1996] 1 BLJ 307 HC ***(refd)***

Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 1 LNS 89 ***(refd)***

MUI Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(refd)***

Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd [1995] 1 LNS 308 ***(refd)***

Re Calgary and Edmonton Land Co Ltd [1975] 1 All ER 1046 ***(refd)***

Pengurusan Danaharta Sdn Bhd v. Kasawa (M) Sdn Bhd [2004] 5 CLJ 474 HC ***(refd)***

Samoana Press Co Ltd [1987] 4 NZCLC 64 ***(refd)***

South African Syndicate Ltd [1883] 28 SJ 152 ***(refd)***

Telescriptor Syndicate Ltd [1903] 2 Ch 174 ***(refd)***

Teng Foh v. Liwu Realty Sdn Bhd [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564 HC ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***

Warbler Pty Ltd [1982] 6 ACLR 526 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 222, 239, 243

Other source(s) referred to:
Palmer's Company Law, 24th edn, p 1839

For the petitioner - George Lim; M/s Battenberg & Talma Advoc
For the respondent - Judith Saga FC
For the applicant - Raymond Lau; M/s Susanna & Lau Advoc

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the applicant's notice of motion seeking leave and an order to stay winding up proceedings under s. 243 of Companies Act 1965 (CA) when there is no appeal pending in the Court of Appeal and the winding up order was given as early as 23 June 1997. In this case, the officer of the director of insolvency has filed an affidavit in support of the application. The only creditor has informed the court it has no objection.

[2] The application is based on the following grounds, namely: (i) the respondent has fully satisfied the debts owing to the petitioner; (ii) there are no other debts owing by the respondent to other creditors; (iii) there is nothing for the liquidator to investigate with regard to the conduct of the respondent, its directors and/or its officer. The affidavit in support reads as follows:

> The respondent is wholly owned by the applicant and I was advised by my advocates that, for this reason, the applicant is the contributory defined in s. 4(1) and s. 243 of Companies Act 1965 to commence this action. A copy of the Company Search of Respondent printed on 29.8.2007 is exhibited hereto and marked as 'DW1'.
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> By a court order dated 23 June, 1997, the respondent was ordered to be wound up by the court on the ground that the respondent was unable to pay a debt of RM270,721.90 to the petitioner. A copy of the Winding Up Petition dated 16th January, 1997 and court order dated 23 June, 1997 are now exhibited hereto and marked as 'DW2' and 'DW3' respectively.

There is no other creditor file any proof of debt against the respondent since it was wound up on 23 June, 1997.

On 26th May, 2008, the petitioner had received a payout from Jabatan Accountant in the sum of Ringgit Malaysia Two Hundred and Fifty Thousand (RM250,000.00) only being the agreed settlement sum for all the debts between the petitioner and respondent *in toto*. A copy of letter from Jabatan Insolvensi Malaysia dated 26th March, 2008 is exhibited hereto and marked as 'DW4'.

After settling the debts owing to the petitioner, the respondent is now clear from all its debts and there is no other debts owing to any creditors of the respondent from the record and accounts of the respondent.

Further, there is nothing for the liquidator to investigate further on the conduct of the respondent, its directors and/or its officer.

There would be new management appointed to the board of the respondent and I verily believe that the new management of the respondent would be able to run and manage the respondent efficiently.

In the premises, I humbly pray for orders in term of this application being granted by this Honourable Court.

[3] The applicant relies heavily on the case *BSN Commercial Bank (M) Bhd. v. River View Properties Sdn. Bhd.* [1996] 1 BLJ 307, where the court stated:

Krextile Holdings Ply Ltd v. Widdows [1974] VR 689 at pp 693-694 laid down a principle akin to that of *Vijayalakshmi Devi* in that the order of a stay of the winding up if expressed in unlimited terms, would put an end to the winding-up process and company can thereupon resume the conduct of its business and affairs as if no winding up existed at all.

Law On Stay

[4] The law on stay of proceedings in company matters can be traced to s. 222 CA 1965 which says that:

At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the court to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

A And s. 243 CA 1965 which states:

> At any time after an order for winding up has been made the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.

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[5] On the facts of this case, s. 222 is not relevant. The issue here is, whether a stay under s. 243 can be given as of right and C secondly whether a stay can be given when there is no pending appeal or cogent reasons for granting the stay. On these issues, the applicant relies on the following cases, namely:

(a) *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392 where it was stated:

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> There are similar provisions in the United Kingdom: see s. 256(1) of the Companies Act 1948 and s. 147(1) of the Insolvency Act 1986, (see *Atkin's Court Forms* (2nd Ed.), (1992 issue), Vol. 10 p. 384, note 1, where it says:
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> > Until the Insolvency Rules 1986 … come into force a winding-up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re Intermain Properties Ltd.* [1986] BCLC 265. The Insolvency Rules 1986 r. 7.47(1) provides F that: 'every Court having jurisdiction under the Act to wind up companies may review, rescind, or vary an order made by it in the exercise of that jurisdiction'.
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> There is no rule of practice or statutory provision in this G country which is equivalent to the U.K. r. 7.47(1) of the Insolvency Rules 1986) and in Australia: see s. 243(1) of the Companies Act 1961, s. 383 of the Companies Act 1981 and s. 482 of the Corporation's Act 1989.
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> The proper course is to stay proceedings under the H winding-up order, and not to discharge it (*Re Baxters, Ltd.* [1898] WN 60): *Palmer's Company Precedents* (17th Ed.) Part II, Winding-up, at p. 96. It is the practice not to rescind the winding-up order, but to stay proceedings under it (*Re Baxters* [1898] WN 60): *Supreme Court Practice* (1993) I Vol. 2, para. 5220 at p. 1618. See also *Atkin's Court Forms* (2nd Ed.), (1992 issue), Vol. 10 p. 46, and at p. 386 Forms 111, 112 for the application and order.

Once a winding-up order has been made, "its descent into dissolution will be prevented only in the unusual event, of the Court ordering either an indefinite stay of the winding-up proceedings or termination of the winding-up. The court has inherent jurisdiction to grant a stay: *Brinds Ltd v. Offshore Oil NL (No. 2)* [1985] 10 ACLR 242. Statutory jurisdiction to grant a stay or terminate is conferred by s. 383 [Companies Act 1981]/s. 482 [Corporations Act 1989]": *Ford, Principles of Company Law*, 5th Ed. (1990), [2207] at p. 770.

A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s. 243(1) of the Companies Act 1965.

(b) *Pengurusan Danaharta Sdn. Bhd. v. Kasawa (M) Sdn. Bhd.* [2004] 5 CLJ 474 where it was stated:

… Upon a close reading of the provision of s. 243(1), it will be noted that the relevant part reads:

> … the Court may, … make an order staying the proceedings either altogether or for a limited time … (emphasis added)

Thus, in the context of a winding-up order, there are two types of stay order:

(a) the "altogether" (or absolute or unlimited) type of stay order; or

(b) the "limited time' type stay order.

…

Thus, the stay order in the present case, being in the nature of a stay pending appeal, clearly is of type (b). It is a limited stay order – limited in time. It is not the absolute or the unlimited type. It is not he "altogether" type.

…

And in another part of the Judgment, His Lordship said:

> *BSN Commercial Bank*, cited by the learned counsel for the petitioner, does not support the petitioner's argument because in that case, unlike the present case, the stay order (of the winding-up order) was not a stay order pending appeal but a stay order

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> expressed in unlimited terms. It was an absolute stay order. It was of the "altogether" type. Furthermore, that case does not involve the application or interpretation of s. 226(3).

B Further, the applicant says that the company is not dissolved and struck off from registration, unless and until the court orders its dissolution upon application from the liquidator under s. 239. Section 239 of CA 1965 reads as follows:

> When the liquidator:
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> (a) has realized all the property of the company or so much thereof as can in his opinion be realized without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors and adjusted the rights of the contributories among themselves and made a final return, if any, to the contributories; or
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> (b) has resigned or has been removed from his office,
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> he may apply to the Court:
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> (c) for an order that he be released; or
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> (d) for an order that he be released and that the company be dissolved.

And the applicant says:

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> The purpose of stay under s. 243 is to intervene and suspend the process of winding up administrative work to be carried out by the Liquidator, i.e, there is nothing left for the Liquidator to administer in the estate of the company and therefore, Liquidator be released sooner and the most importantly, the company is still
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> alive.

and concludes that the law today is settled that once winding up order is made by the court, there cannot be discharge or rescission of the 'winding up order'. The only remedy is to 'stay' H the winding-up process under s. 243.

Law On Stay Of Winding Up

[6] The learned author K.V. Padumanabha Ram in his book *Winding Up of Companies* – has put much thought into this area of I law. It can be summarised as follows:

(a) The CA 1965 or the Companies (Winding-up) Rules 1972 (CR 1972), contains no provision for setting aside or for rescinding a winding-up order made by the High Court and the judicial view on the question of having the power, inherent or otherwise, to do so is also not uniform. The foreign precedents also show conflicting views on this point. (see *Brindon New Zealand Ltd. v. Tent World Ltd.* [1992] 3 NZLR 725, *South African Syndicate Ltd.* [1883] 28 SJ 152, *Blatt Ray Inc.* [1939] 20 CBR 447, *Samoana Press Co. Ltd.* [1987] 4 NZCLC 64).

(b) Section 243 of the Act empowers the court to stay the winding-up proceedings. That discretionary power can be exercised at any time after an order for winding-up has been made, on an application of: (i) the liquidator; (ii) any creditor; or (iii) contributory. On proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, the court may make an order staying the winding-up proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. Before making any such order on an application for stay, the court may require the liquidator to furnish a report with respect to any facts or matters which in his opinion are relevant. The report of the liquidator, when it is called for by the court, should reflect the fact that he has carried out a proper investigation into the affairs of the company and must make references to the company's book or audited accounts or make consultations with the principal officers of the company such as the auditor and the secretary. This he has to do before coming to a conclusion that the company is solvent. The liquidator is duty bound to place before the court all the relevant facts without any tinge of partiality. The report should also refer to the 'ugly side' of the company's affairs if any and also refer to the adverse effect of the stay on the person seeking it. An office copy of every order made under s. 243 is to be lodged by the company with the registrar and also the official receiver within fourteen days after the making of the order and any failure to comply by the liquidator or had obtained judgment against the company in the civil suit, otherwise, it would remain a person 'claiming to be a creditor'.

(c) The normal practise which the courts have been following is not to grant a stay of the winding-up proceedings immediately after a winding-up order is made. (see *A & B.C Chewing Gum* [1975] 1 WLR 579). In *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136, the court stated:

> Under the law, the granting of a stay of further proceedings of the winding-up is a discretionary matter for the court, and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion, the court has to consider the factors and principles which have been established by decided cases.

In *Vijayalakshmi Devi Nadchatiram v. Dr. Mahadevan Nadchatiram & Ors.* [1995] 3 CLJ 493, the Federal Court referring to s. 243 of the Act pointed out:

> It is clear from s. 243(1) that the court has a discretion, on the application of the liquidator or Official Receiver, or any creditor or contributory to stay the proceedings under a winding-up order. But, before granting a stay, the section requires on proof to the satisfaction of the court that it ought to grant a stay. This means that the court has to be satisfied that it is right to stay the winding-up proceeding and if there be matters as to which the court has doubts, it should not grant a stay.

(d) In granting a stay of the winding-up proceedings, the court will take into certain considerations which have been evolved by a number of judicial decisions. (see *Warbler Pty. Ltd.* [1982] 6 ACLR 526 = 1 ACLC 323, *Calgary and Edmonton Land Co. Ltd.* [1975] 1 All ER 1046 = [1975] 1 WLR 355, *Telescriptor Syndicate Ltd.* [1903] 2 Ch 174).

In *Vijayalakshmi Devi Nadchatiram v. Dr. Mahadevan Nadchatiram & Ors (supra),* the Federal Court observed:

> In summary, the principles which emerge from the above authorities are these:
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> (1) The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
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> (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.

(3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

(e) Delay in making the application for stay maybe fatal as elucidated in *Re Calgary & Edmonton Land Co. Ltd.* [1975] 1 All ER 1046 on an application under the English Companies Act for stay of the winding-up proceedings where the court stated:

> That the applicant for a stay must make out a case that carries conviction. It may be that where the liquidation has been proceeding for only a short while the court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it.

(see *Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn. Bhd. & Ors.* [1981] 1 LNS 89).

(f) There are also cases in Malaysia where the orders of winding-up passed *ex parte* or where there was no proper service of the petition on the company have been set aside, though, of course, the question of jurisdiction was not specifically raised by the petitioners or was decided by the court. (see *Teng Foh v. Liwu Realty Sdn. Bhd.* [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564, *MUI Bank Bhd. v. Golden Hornbill Hotel Sdn. Bhd.* [1993] 1 CLJ 204). In *Perdana Merchant Bankers Bhd. v. Maril Rionebel (M) Sdn. Bhd.* [1995] 1 LNS 308 the court stated:

> I am of the considered view that the Act or the Rules make no express provision enabling the High Court to set aside or rescind a winding-up order after it had been perfected. The scheme of the Act is such that an aggrieved party may under s. 253 of the Act appeal against a winding-up order (see *Sri Hartamas as Development Sdn Bhd v. MBF Finance Bhd.* [1991] 3 MLJ 325, *Palmer's Company Law* (24th edn.) at p. 1839), or apply to stay the proceedings under s. 243 of the Act altogether or for a limited time, under terms and conditions which the court thinks fit. A stay of a winding-up proceeding altogether has the effect of a total

A discontinuance or termination of the winding-up proceedings. A winding-up order could not be discharged or rescinded after it has been made (see *Vijayalaksmi Devi*'s case; *Re Baxters Ltd* [1898] WN 60, *Quikcksafe Freightlines Pty. Ltd. v. Shell Company of Australia Ltd.* [1985] 3 ACLC.

B And, after pointing out that as a matter of interpretation, the court will not fill in the gaps left by legislation, Abu Samah JC (as he then was) further said:

> The Act or the rules made thereunder have no
> C corresponding provision similar to r. 7.47(1) or the English Insolvency Rules 1986 which provides that, "every court having jurisdiction under the Act to wind up companies may review, or vary an order made by it in the exercise of that jurisdiction'. In *Re Intermain Properties Ltd.* [1986] BCLC 265, the court held that it did not have jurisdiction to
> D rescind a perfected winding-up order and the proper procedure for the petitioner was to apply on notice of motion for a stay of the winding-up under s. 549 of the English Companies Act 1985. (see also *Apirami Sdn. Bhd.* and *The Law of Company Liquidation* by McPherson and JO
> E Donovan at p. 443). With respect, I am unable to follow the decision of the learned Thomas J in *Bridon New Zealand Ltd. v. Tent World Ltd.* [1992] 3 NZLR 725 who elected, "to review the rule and discard it on the basis that it has outlived its usefulness', even though there was no
> F corresponding provision akin to r. 7.47 of the English Insolvency Rules 1986.

[7] I have read the notice of motion, affidavits filed in this action and the submission of the applicant in detail. I take the view the application must be dismissed. My reasons are as follows:

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(a) As a general rule the court has jurisdiction to set-aside, vary or rescind any of its order, inclusive of a winding up order for good and explicit reasons taking into consideration public interest, notwithstanding s. 243 of CA 1965 does not
H encompass such wide powers.

(b) Stay of winding up order will be sparingly exercised if there is no appeal pending; and in almost all cases the stay will not be granted if there was substantial delay in making the application. The reasons for the delay must be satisfactorily
I explained.

(c) The affidavit in support must set out valid reasons for the application. It is not sufficient to assert that the debt has been repaid and/or the creditors have no objection. Further, the affidavit in support of the director of insolvency must be seen to be a report after thorough investigation of the affairs of the company, and the reason for the application for stay on the facts and on the grounds stated by the applicant. The issue of public interest must also be taken into account.

(d) In this case, there was substantial delay in making the application. The reasons for the delay were not explained. The affidavit in support and that of the affidavit of director of insolvency does not give satisfactory grounds for the court to exercise its powers under s. 243 of CA 1965 and/or inherent jurisdiction of the court.

[8] For reasons stated above, the notice of motion encl. 40 is dismissed with no order as to costs.

I hereby order so.